Supreme Court, U.S.
FILED
MAY 7 1991
OFFICE OF THE CLERK

No. 90-1554

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

KEVIN KING, as father and next friend of BEN KING, a minor, and KEVIN KING and MARY JO KING, individually,
Petitioners,

v.

EASTERN AIRLINES, INC., a Delaware corporation,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Florida

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE PROPER "WILLFUL MISCONDUCT" STANDARD AS USED IN THE WARSAW CONVENTION WAS APPLIED TO THIS CASE.

LIST OF ALL PARTIES TO THE PROCEEDING

The only persons and entities who have an interest in the outcome of this case are Petitioners and Respondent.*

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* In response to Rule 29.1, Respondent Eastern states that it is a subsidiary of Texas Air Corporation and that the following is a list of Eastern's subsidiaries: Airport Ground Services Corporation, Dorado Beach Development, Inc., Dorado Beach Estates, Inc., EAL, Inc., EAL Properties, Inc., Eastern Airlines Leasing, Inc., Eastern Airlines of Puerto Rico, Inc., Ionosphere Clubs, Inc., JCSS Corporation, Protective Services Corporation, Terminal Sales Company.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Eastern Airlines, Inc. ("Eastern"), respectfully requests that this Court deny the petition for writ of certiorari ("Petition"), seeking review of the opinion rendered in this case by the Third District Court of Appeal of Florida. The opinion is reported at 561 So.2d 1220 (Fla. 3d DCA 1990), *rev. denied*, 576 So.2d 288 (Fla. 1991).

STATEMENT OF FACTS

A. The Question Presented was neither raised in nor decided by the Florida Supreme Court.

Petitioners set forth the fact that the issue as to the proper standard of "willful misconduct" under the War-

saw Convention [1] was presented to the trial court and the Third District Court of Appeal of Florida ("Third District"). However, the Question Presented was not raised in the Florida Supreme Court. Rather, the *only* issue presented to Florida's highest court was whether the Third District correctly applied another decision, that of *Eastern Airlines, Inc. v. Charles King*, 557 So.2d 574 (Fla. 1990), under principles of *res judicata* and *stare decisis*. The Florida Supreme Court declined to address the aforementioned question.

B. Facts and Procedural History.

Petitioners, Kevin King, Ben King and Mary Jo King ("Petitioners"), brought suit against Eastern arising from an incident which occurred on Eastern's Flight 855 on May 5, 1983. Petitioners were passengers on board the flight which was travelling from Miami to Nassau, Bahamas, when one of the plane's engines failed and the flight crew turned the plane around to Miami. Subsequently, the plane's other two engines failed and the plane began to descend. The crew and passengers were prepared for the anticipated "ditching" of the plane when the crew was able to restart one of the engines. As a result of the crew's efforts, the plane safely landed at Miami International Airport.

At the time Mary Jo King was a passenger on Flight 855, she was pregnant with Ben King. Petitioners alleged that Mary Jo King's pregnancy was adversely affected by the flight resulting in Ben King's premature birth and allegedly permanent injuries as a direct result of Eastern's actions. Accordingly, they claimed that Eastern's conduct was "willful" under the Warsaw Convention. In all counts of the complaint, Petitioners al-

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 1502 note (1970) (Warsaw Convention).

leged that Eastern breached its duty of care in transporting Mary Jo King "by failing to properly, adequately and safely service and maintain the aircraft used for Flight No. 855 by failing to install oil seals or 'o-rings'."

Petitioners' count for willful misconduct alleged that Eastern "failed to institute appropriate procedures to cure a maintenance problem of engine failures due to missing o-rings. . . ." Eastern moved for summary judgment, maintaining that because it had not acted with willful misconduct, damages should be limited to $75,000 pursuant to the terms of the Warsaw Convention.[2] Eastern demonstrated that it initiated numerous measures to insure that o-rings were being installed. Moreover, the evidence proved that Eastern did not intentionally fail to install the o-rings on Flight 855. Nevertheless, the trial court denied the motion. Eastern's subsequent motion for directed verdict, based upon the same evidence which demonstrated that Eastern's actions were neither deliberate nor intentional, was also denied.

The jury returned a verdict in favor of Petitioners in the amount of $706,203.99. Petitioners moved for a new trial on damages only and the trial court granted that motion, finding that the verdict amount was inadequate. Eastern appealed to the Third District on the ground that the award should have been limited to $75,000, the liability limitation under the Warsaw Convention, because Eastern's actions were not willful. The Third District agreed and reversed the award to Ben King[3] with directions to enter judgment in the amount of $75,000, based upon the Florida Supreme Court's indistinguishable holding in *Charles King*, which was decided on the same alle-

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[2] Article 25 of the Warsaw Convention provides that if a carrier's misconduct rises to the level of being "willful," the exclusions and limitations of the Convention do not apply.

[3] The Third District remanded the claim by Kevin King for a determination of his derivative damages. *Kevin King*, 561 So.2d at 1222.

gations as set forth in the complaint here. *Charles King* held that Eastern's actions had not been willful under either federal or Florida law. In making that determination, the Florida Supreme Court applied the federal standard enunciated in *Butler v. AeroMexico*, 774 F.2d 429 (11th Cir. 1985) and concluded that:

> [Plaintiff's] allegations are not sufficient to support a claim for reckless or intentional conduct. It follows that we must further hold that he has no basis to assert a claim alleging "willful misconduct." *We reach this conclusion whether we apply the federal interpretation of "willful misconduct,"* *Butler v. AeroMexico*, 774 F.2d 429 (11th Cir. 1985), or the Florida standard for the recovery of punitive damages. *White Construction Co. v. DuPont*, 455 So.2d 1026 (Fla. 1984).

Charles King, 557 So.2d at 578 (emphasis added). Accordingly, in following the directive of the Florida Supreme Court in *Charles King*, the Third District here concluded that the trial court should have directed a verdict on the issue of willfulness.

Petitioners sought discretionary review of this matter in the Florida Supreme Court, asserting that the Third District had erred in applying the *Charles King* holding to this case. The only basis for the argument was that the Third District, by applying *Charles King* here, had violated principles of *res judicata* and *stare decisis* announced by the Florida Supreme Court. Petitioners' brief to the Florida Supreme Court cited only state decisions in support of their argument. The Florida Supreme Court denied the petition for review.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE QUESTION PRESENTED WAS NEITHER RAISED IN NOR DECIDED BY FLORIDA'S HIGHEST STATE COURT.

The sole Question Presented in the petition is whether the proper standard of "willful misconduct" was applied in this case. However, Petitioners did not raise this issue in the Florida Supreme Court. It is well-settled that when an issue was neither raised in nor decided by the highest state tribunal, there is a strong presumption against review by this Court. *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 883 (1986); *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *see also Illinois v. Gates*, 462 U.S. 213, 217 n.1 (1983) (no jurisdiction where issue was neither raised in nor decided by highest state court); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (same); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313 n.6 (1968) (same); *Beck v. Washington*, 369 U.S. 541, 553 (1962) (same); *White River Lumber Co. v. State of Arkansas*, 279 U.S. 692, 700 (1929) (same).

Indeed, the only question before Florida's highest state court was whether the intermediate appellate court here properly applied the holding of another case, *Charles King*, which arose out of the same incident on Eastern's Flight 855. The allegations concerning Eastern's purported conduct contained in the complaint in *Charles King* and the facts alleged in this case are identical. The determination that Eastern's conduct was not willful was decided in *Charles King* under both the *federal* and state standard. In this case, Florida's Third District was faced with a case which arose out of the same incident and involved *the identical conduct* of Eastern as that previously adjudged "not willful" in *Charles King*. Therefore,

the only task before the intermediate appellate court in this case was to apply the *binding precedent* of Florida's highest state court. *See Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973) (district courts of appeal are required to follow Florida Supreme Court decisions). The Third District, therefore, correctly followed the indistinguishable authority of *Charles King*.

Subsequently, Petitioners sought review in the Florida Supreme Court. At that time, Petitioners had the opportunity to ask the court to determine the application of the "willfulness" standard in this case. However, no such issue was presented. Ironically, now Petitioners argue that the issue here is "important." (Petition at p. 16). Manifestly, if the issue was so important, Petitioners would have raised it in the Florida Supreme Court. As they failed to provide Florida's highest state court the opportunity to consider the Question Presented here, the petition is not properly before the Court.

II. THE DECISION OF THE STATE COURT BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT CONCERNING THE MEANING OF THE PHRASE "WILLFUL MISCONDUCT" AS USED IN THE WARSAW CONVENTION.

Petitioners have failed to demonstrate that the decision of the Third District conflicts with a decision of *any* other state or federal court. The only determination made in the Third District was whether the holding of *Charles King* applied. In *Charles King*, Florida's Supreme Court unanimously held that Eastern could not be found liable for willful misconduct *under either Florida or federal law*.

> [Plaintiff's] allegations are not sufficient to support a claim for reckless or intentional conduct. It follows that we must further hold that he has no basis to assert a claim alleging "willful misconduct." *We reach this conclusion whether we apply the federal interpretation of "willful misconduct," Butler v.*

> *AeroMexico*, 774 F.2d 429 (11th Cir. 1985), or the Florida standard for the recovery of punitive damages. *White Construction Co. v. DuPont*, 455 So.2d 1026 (Fla. 1984).

Charles King, 557 So.2d at 578 (emphasis added). As *Charles King* was indistinguishable from the case here, the Third District merely applied the holding of that case.[4]

Petitioners argue that this Court should determine that federal, not state, law applies to define "willful misconduct" under the Warsaw Convention. However, here, Florida's appellate court followed the binding pronouncement in *Charles King*, which *did* apply federal law in holding that Eastern's actions were not willful. In fact, *Charles King* applied the test enunciated in *Butler v. AeroMexico*, the very case which Petitioners ask this Court to apply. (Petition at p. 10; 12). In considering the same "well-defined" (Petition at p. 10) federal standard which has consistently been applied in *Butler* and other federal cases under the Warsaw Convention, the Florida Supreme Court found that Eastern's conduct did not constitute "willfulness." Accordingly, as the federal standard of *Butler* was applied, neither *Charles King* nor the decision of the Third District here, conflicts with any case.

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[4] The issue which Petitioners wish this Court to consider, whether federal law should be applied in determining "willful misconduct" under the Warsaw Convention, was not decided by the Third District here. Rather, the issue was considered and decided by the Florida Supreme Court in *another case* which is not before the Court, that of *Charles King*. The court in that case applied the federal "willful misconduct" standard and determined that Eastern's conduct did not rise to that level. Thus, Petitioners are actually improperly seeking review of the decision rendered in *Charles King*.

III. THE QUESTION PRESENTED ASKS THIS COURT TO RESOLVE A FACTUAL DISPUTE.

Petitioners' entire willful misconduct argument is predicated on the very same allegations that the Florida Supreme Court in *Charles King* determined were insufficient to demonstrate willful misconduct *under federal law*. It is evident from Petitioners' argument that they take exception to the *outcome* of *Charles King* which applied the correct federal standard enunciated in *Butler*. Petitioners thus seek a factual determination by this Court that Eastern acted willfully *in this case*. This Court has refused to grant certiorari to review questions of fact. *Massachusetts v. Sheppard*, 468 U.S. 981, 988-89 n.5 (1984); *United States v. Doe*, 465 U.S. 605, 613-14 (1984); *N.L.R.B. v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177 n.8 (1981); *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111-12 (1980); *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635-36 (1967); *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952).

Rule 14 of the Supreme Court Rules requires that a petition for writ of certiorari contain "a *concise* statement of the case containing the *facts material* to the consideration of the *questions presented*." Sup. Ct. R. 14 (emphasis added). Petitioners' extensive discussion of the facts is not material to the consideration of the Question Presented regarding the proper standard of "willful misconduct" under the Warsaw Convention.

Moreover, Petitioners' lengthy references to the facts, with citations to the record and trial transcript, demonstrates the lack of importance this case has to the general public, as contemplated under Rule 10.1.(c) of the Supreme Court Rules.[5] Petitioners' fact-specific presentation

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[5] In their pursuit to have the Court reconsider the state court's factual determination, Petitioners omit *any* evidence which demon-

illustrates that the issue presented is important only to the particular litigants. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) ("[a] federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . Special and important reasons imply a reach to a problem beyond the academic or the episodic.")

Petitioners concede that "determining whether willful misconduct occurred in a given case is an extremely fact-sensitive inquiry."[6] (Petition at p. 13). Indeed, as evidenced by Petitioners' "Parties to [the] Proceeding" page, "[t]he only persons and entities who have an interest in the outcome of this case are Petitioners and Respondent." (Petition at p. ii). Manifestly, this is not the type of issue worthy of this Court's review.

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strated that Eastern's actions did not amount to willful misconduct. Some of those facts, such as Eastern's actions in taking measures to correct the o-ring problem, are discussed in the Statement of Facts herein. However, as this brief is on the jurisdiction of the Court rather than one concerning the merits, Eastern will not indulge in a similar perusal of the particular facts of the case.

[6] Petitioners are correct that the opinion of the Eleventh Circuit Court of Appeals in *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462 (11th Cir. 1989) demonstrates that the Question Presented here is fact-specific and must be decided on a case by case basis. (Petition at p. 13). However, Petitioners are incorrect to rely upon the Eleventh Circuit's opinion for any other reason, as that decision was reversed by this Court in *Eastern Airlines, Inc. v. Floyd*, 59 U.S.L.W. 4307 (U.S. Apr. 17, 1991), *reversing* 872 F.2d 1462 (11th Cir. 1989).

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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May 1991